IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Madan Das & ors.	vs.	Mangi Lal (since deceased) through his Legal representative Nemi Chand & ors.

S.B. Civil Second Appeal No.61/1984 against the judgment and decree dated 28.3.1984 passed by the learned Civil Judge & Addl. Chief Judicial Magistrate, Sojat Civil Appeal Decree No.41/83.

Date of Judgment: March 08, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. Anand Purohit,for the appellant.
Mr. Mordhwaj Raj Mehta for the respondents.

BY THE COURT:

The appellant is aggrieved against the judgment and decree dated 28.3.1984 by which the first appellate court allowed the appeal of the plaintiffs-respondents and reversed the dismissal of the suit of the plaintiffs which was dismissed by the trial court by judgment and decree dated 8.3.1983.

Brief facts of the case are that the plaintiffs filed the suit for permanent injunction against the defendant-appellant with allegations that in the town of Nimboj, Tehsil Jaitaran, a Digambar Jain Temple is situated which is very old one. The pilgrims in large number used to visit

this temple through the way situated near the temple. There is also one big chowk near the temple, which is also used for various religious functions. Near this way, the house of the defendants is situated. The defendant number 1 to 3 encroached upon part of the land of the way on 9.1.1974 and constructed a latrine and raised construction of a platform (*Chabutara)*. They put some stones. By this, the width of the way 20' has been reduced to 9' for some area of the total way. The plaintiffs sought declaration that the said land may be declared as public way and public chowk and the pilgrims of the temple have right to use the way to its full width. The plaintiffs also sought decree for mandatory injunction of removal of the encroachment. The plaintiffs submitted the sketch-map with measurement along with the plaint.

The defendants denied the plaint allegations about the defendants' encroachment over the land. According to the defendants, the land in question is *Patta-sud* land of defendants no.1 to 3 and is in possession of defendants no.1 to 3. It is submitted that the way is not 20' wide and it is narrow at some place. The defendants pleaded that *Patta* of the defendants is dated 17.10.1951. The trial court while deciding issue no.1 held that the suit land is covered by the *Patta* produced by the defendant, however, the trial court held that the construction was not raised in April, 1974 as alleged by the plaintiffs but was raised in the year 1973.The trial court dismissed the suit of the

plaintiffs but the appellate court after looking to the facts relating to issuance of *Patta* held that in case *Patta* is issued on the basis of the old possession, then the old possession may be relevant but when one claims possession on the basis of *Patta* then he can claim possession of the land to the extent of measurement in the *Patta*. It will be sufficient to mention here that the first appellate court has some doubt about the area falling within the area given in the *Patta* but apart from that fact, the first appellate court reached to the conclusion that the land in question is used by the public for religious activities and the land is dedicated for public purpose. The first appellate court, therefore,set aside the judgment and decree of the trial court and decreed the suit of the plaintiffs and granted mandatory injunction. Hence this appeal.

The appeal though was admitted by order dated 4.5.1984 but without framing the substantial questions of law. The second appeal can be entertained only on involving substantial question of law. In this case, even if we may go through the facts which have been alleged by the defendants, then according to the defendants the *Patta* was issued in favour of the defendants on 17.10.1951. The disputed structure was constructed by them in the year 1973 even as per the judgment of the trial court which is in favour of the defendants. The defendants cannot claim construction prior to 1973. The land remained open from 1951 to 1973. The existence of Chowk and way leading to the temple is not in

dispute. The religious functions of the temple are held in the temple as well as in the chowk, therefore, from these circumstances, it can be presumed that the land was used by the public for such a long period upto the year 1973 without any obstruction. The width of the way is 20' and that cannot be said to be more width than required or that the public could not have used that entire width of the way. The first appellate court considered all the evidence, documentary as well as oral and thereafter, examined the legal position before reversing the judgment of the trial court and decreed the suit of the plaintiffs. The finding is based on appreciation of the evidence and substantially it is a case of facts rather than the case of law. In view of the above, I do not find that any substantial question of law is being involved in this appeal and after going through the entire record, this Court is of the view that the first appellate court rightly set aside the judgment and decree of the trial court and rightly decreed the suit of the plaintiffs. It will be worthwhile to mention here that even defendant himself removed some of the structures during trial and this fact has been taken note of by the trial court in its judgment.

In view of the above, I do not find any force in this appeal. Hence the appeal of the appellant is dismissed.

(PRAKASH TATIA),J.

mlt.